First Principles.

NATIONAL SECURITY AND CIVIL LIBERTIES

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REFORMING THE INTELLIGENCE AGENCIES

In This Issue: Reforming the Intelligence Agencies: Proposals of the ACLU, the Ford Administration, and the Pike Committee

Coming: April: ACLU Class Action Surveillance Suits

In The News

February 9, 1976 The Chesapeake and Potomac Telephone Co., a defendant in the national security wiretap lawsuit of journalist Tad Szulc and his wife Marianne, described its 36-year role in assisting the FBI with national security wiretaps as "purely technical" and that it relied on the good faith of the government as to legality. (*Washington Post*, 2/10/76)

February 11, 1976 To avoid appearances of "improper use" by the agency, DCI George Bush announced that the CIA will terminate full or part-time employment of reporters with US news organizations. Bush denied any secret CIA contracts with American missionaries or clergy and refused to make public the names of journalists or clergy who had cooperated with them in the past. (*Washington Post*, 2/12/76, p. 1)

February 12, 1976 The CIA denied a *New York Times* FOIA request for names of American and foreign news organizations providing cover for American intelligence-gathering operations. The agency based its refusal on the claim that such information would disclose identities of sources and details of methods. Director Bush assured the *Times* that no full-time *Times* staffers were currently being "used operationally" by the CIA, but that it was not CIA policy to comment on part-time correspondents. (*New York Times*, 2/13/76)

February 12, 1976 A confidential CIA memorandum revealed that Director of Central Intelligence William Colby had approved a secret study on the legal basis for foreign and domestic activities of the intelligence agencies. The study concluded that, prior to the 1974 Foreign Assistance Act, there existed no legal or constitutional grounds for the CIA's covert political or military operations without advance Congressional approval. This directly contradicts the CIA's public position that the President has constitutional authority to conduct such operations. (*New York Times*, John M. Crewdson, 2/13/76)

February 15, 1976 In a CBS television interview, CIA Director George Bush, declined to report whether CIA funds were being used in Angola, and referred his questioners to Congress for further information, "which I hope they wouldn't give." (*New York Times*, 2/16/76)

February 16, 1976 Completing a two-year study inspired by Nixon administration scandals, the ABA annual meeting approved recommendations to "depoliticize" federal law enforcement: creating machinery to establish a special prosecutor under specified conditions; and prohibiting the appointment of individuals who have played leading roles in presidential campaigns to the post of Attorney General. (*Washington Post*, 2/17/76)

February 17, 1976 The Attorney General issued temporary rules permitting the FBI to investigate news leaks of previously secret information when requested by the Attorney General to do so. According to a Justice Department spokesperson, such approval will be given only when there is probable cause to believe that a federal law has been violated. (*Washington Post*, 2/17/76)

February 25, 1976 A Virginia prosecutor asked the Justice Department for evidence in a 1971 break-in of a photographic studio, ordered by then-Director Helms, which was allegedly intended to recover missing CIA documents. The prosecutor is also considering asking the department for its evidence in CIA plots against the life of Fidel Castro. (*New York Times*, 2/26/76)

February 24, 1976 President Ford invoked executive privilege in ordering the FBI and NSA not to comply with the request of a House subcommittee for information about government interception of telegraph and Telex messages. The subcommittee voted the following day to recommend contempt citations against present and former FBI and NSA employees. Claiming that release of such records would endanger national security, Ford also instructed Western Union not to produce documents; Chairperson Bella Abzug suggested Ford may be covering up an ongoing interception program. The companies later agreed to provide material. (*New York Times*, 2/25 & 2/26/76)

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.

THOMAS PAINE

In The Courts

July 11, 1975 *Allen v. Monger*, 404 F. Supp. 1081 (N.D. Cal. 1975). Outside a combat zone, captain of a military ship "may not require prescreening of petitions nor place any other prior restraint on the circulation of petitions on ship board.... The right of the drafter and circulator of a petition to remain anonymous shall be preserved." Where First Amendment rights are asserted, court should abandon effort to determine if damages of $10,000 are involved: "First Amendment rights are sacrosanct and should be presumed worth far in excess of $10,000."

In The Congress

February 11, 1976 The House Intelligence Committee filed its package of 20 recommendations for establishment of a permanent House intelligence oversight committee and other changes in the operation and organization of the intelligence community. See the article on p. 3.

February 11, 1976 Senate leadership called for compromise legislation to end the Judiciary Committee deadlock on S.1, proposing a new bill for reform of the federal criminal code which would eliminate the provisions on official secrets and other controversial subjects while maintaining noncontroversial sections, including listing in one place in the federal code of laws all major crimes and legal defenses. (*Washington Post*, 2/12/76)

February 18, 1976 Senate passage of a bill took a major step toward establishing Congressional control over military foreign aid and sales; the bill would require public reports of major arms sales and allow Congress to veto any arms sale which exceeds $25 million, involves a major weapons system, or supplies arms to countries which are violating human rights by torture. (*Washington Post*, 2/19/76)

In The Literature

Articles

"Covert Action: Swampland of American Foreign Policy," by Sen. Frank Church, *Bulletin of the Atomic Scientists*, February 1976, p. 7. The Chairman of the Senate Intelligence Committee finds in the excesses of the CIA the symptoms of an illusion of American omnipotence which has entrapped and enthralled the nation's presidents.

"Correction of Intelligence Abuses Unlikely Under Ford Scheme", by Herbert Scoville, Jr., *Washington Star*, Feb. 29, 1976, p. E-3. A former deputy director for research at the CIA analyzes President Ford's executive order for reform of the intelligence community and concludes that the President's restrictions contain so many exceptions that they could become a justification for previously questionable activities. He doubts whether the three "veterans of the Cold War" appointed to the new Oversight Board could provide effective control, calls for legislative action rather than executive order to correct the abuses of the past, and criticizes the stricter secrecy standards proposed by the President, which would impose penalties and prior restraints on thousands of government persons with any access to intelligence.

Government Publications

FBI Domestic Intelligence Operations — Their Purpose and Scope: Issues that Need to Be Resolved. Report to the House Judiciary Committee by the Comptroller General on FBI domestic intelligence operations and proposals to Congress and the Attorney General for changes, including a call for more public debate. Examining a random sample of 898 recently active cases, the GAO concentrated on the FBI's legal authority for domestic intelligence operations; the policies, procedures, sources, and techniques applied in domestic investigations; oversight and control of operations; and the FBI's use of funds and staff in the domestic area. Copies are available to the general public at $1/copy (payable to the U.S. General Accounting Office) from the U.S. GAO, Distribution Section, P.O. Box 1020, Washington, D.C. 20013. Non-profit organizations may obtain two free copies. Report Number: GGD-76-50.

The Report of the House Select Committee on Intelligence, in the *Village Voice*. February 17, 1976: the report on uncontrolled intelligence spending, intelligence failures, and domestic operations; February 23, 1976: executive branch obstruction of the congressional investigation, including denial of information, refusal to testify, etc.

Law Reviews

Project: Government Information and the Rights of Citizens 73 Mich.L.Rev. (May-June 1975). Addresses two major societal concerns crucial to a representative democracy — the individual's right of access to government-held information and governmental recognition of individual privacy interests. The project discusses federal and state responses to these concerns, including the classification system, executive privilege, the FOIA, state and federal open-records and privacy laws, and the Privacy Act of 1974; includes proposals for changes.

Books

The Final Days, by Bob Woodward and Carl Bernstein (Simon and Schuster: New York, April 1976). The journalists who broke the Watergate scandal chronicle the last frantic months of the Nixon Administration.

How The Good Guys Finally Won: Notes from an Impeachment Summer, by Jimmy Breslin (Viking: New York, 1976). Tells of the real heroes of Watergate.

The Murder of Allende and the End of the Chilean Way to Socialism, by Robinson Rojas Sandford, translated by Andree Conrad (Harper and Row: New York, 1976). A left-wing Chilean journalist's study of events leading up to the 1973 overthrow of the socialist government in Chile, in which he alleges that the Pentagon, Nixon's White House, the CIA, and ITT employed terrorist methods and economic sabotage to topple Salvator Allende; description of the coup's bloody aftermath.

Twenty Years and Twenty Days, by Nguyen Cao-Ky (Stein and Day: New York, 1976). Reflections and recollections of the former Vietnamese leader, including details of his work with Colby and the CIA.

Watchman in the Night: Presidential Accountability After Watergate, by Theodore C. Sorensen (M.I.T.: Cambridge, 1976). Calls for an end to unnecessary government secrecy and stricter oversight of investigative agencies.

Reforming the Intelligence Agencies:

Proposals of the American Civil Liberties Union
the Ford Administration
the House Select Committee on Intelligence

CHRISTINE M. MARWICK

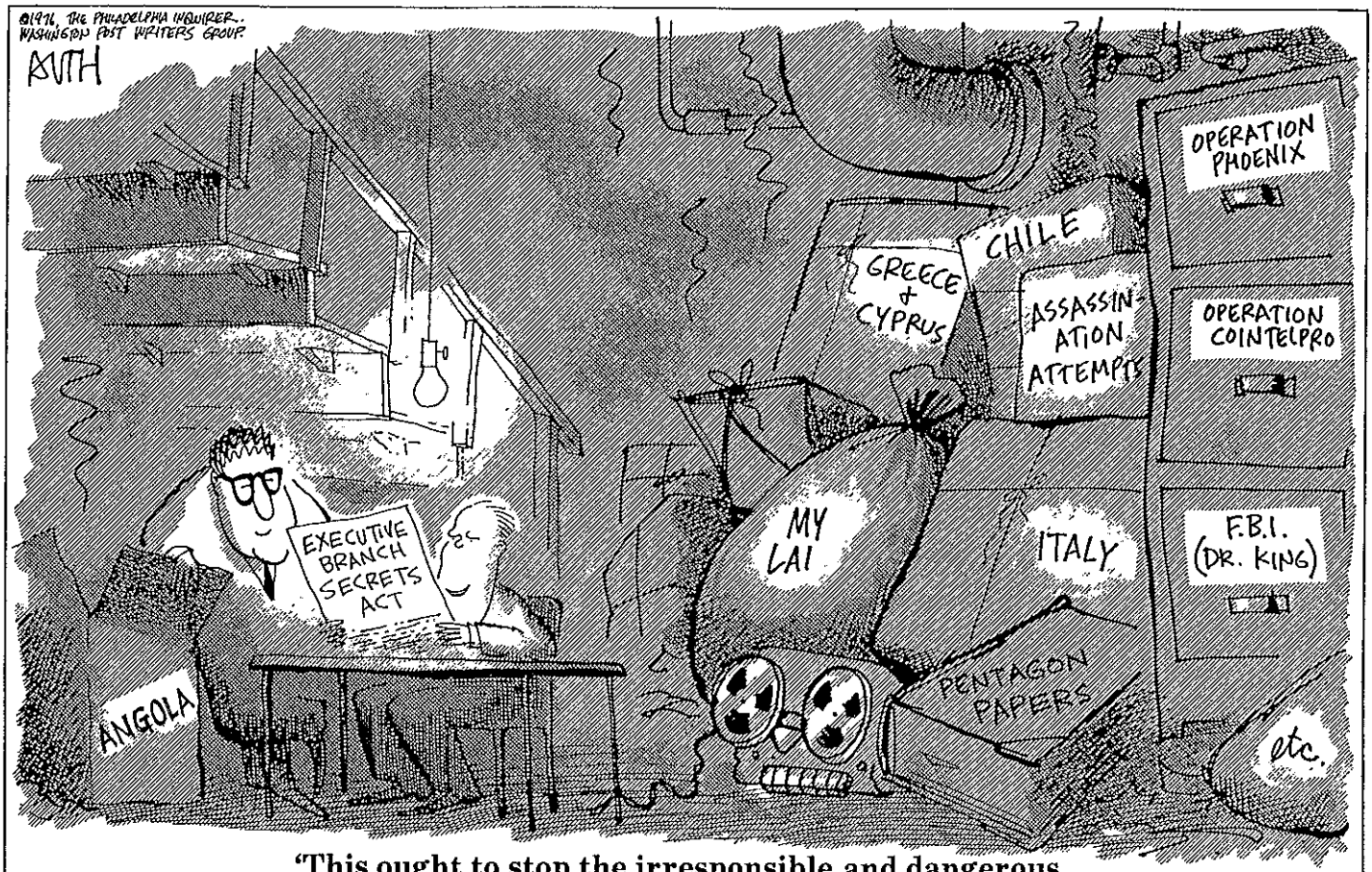
Three Programs for Reform: Definitions of the Problem

The investigations of the intelligence agencies which have been going on for over a year now have documented abuses of secret power which had before been only the unconfirmed subject of leaks: for thirty years the people of the United States have been supporting foreign policy objectives and tactics which could not be publicly acknowledged and which were implemented abroad — and ultimately at home — by massive but secret intelligence organizations which were in effect designed to subvert the democratic principle of the informed consent of the governed. The record is one of "plausible denials" followed by unavoidable admissions: interfering in free elections and toppling democratic governments abroad, COINTELPRO and Operation CHAOS at home. The justification for the existence of the intelligence agencies has been called into question — for all their claims that the interests of "national security" allowed them to trample civil liberties, it is unclear that they have been able to effectively perform the functions for which they were created.

In the continuing furor, one point is clear to all sides: something must be done.

In Executive Order 11905 released on February 18th, the Ford administration presented its solution to these problems. It was couched in the language of remedying abuses and ineptitude, but its provisions add up only to plugging leaks, establishing censorship, and authorizing the surveillance of lawful dissent. It should not be surprising that the system which has provided the nation with a long series of policy disasters should propose "reforms" which address not its own failures of principle and effectiveness but the loss of its ability to cover up — the leaking of information through a wall of secrecy.

In its suppressed and then leaked report, the House Select Committee on Intelligence, chaired by Rep. Otis Pike, presented the view that the executive branch and its intelligence agencies have been insisting that Americans give up something for nothing



'This ought to stop the irresponsible and dangerous exposure of our nation's intelligence secrets.'

— the right to healthy political debate in exchange for dangerously ineffective intelligence programs and decisions. The Pike Committee's recommendations, which were publicly released, include a variety of potentially effective limitations on the abuses of the intelligence agencies, but it was not in a position to take the issues to their logical conclusion — that secret abuses of power in a system of covert activities are inevitable.

Presenting a third set of proposals for reform, the American Civil Liberties Union has concluded that it is time to go beyond patching controls and accountability onto secret government — it is now time to abandon such covert actions and clandestine organizations as technologically and politically obsolete.

The ACLU defines the problems to be addressed in much the same terms as the Select Committee, but takes its program for reform a step further: it is time for a return to first principles — that effective government requires the informed consent of the governed, the rule of law rather than of men, and the continued importance of the principles in the Bill of Rights. The ACLU position is that the record shows that the government's policy cannot be separated from foreign policy; a foreign policy based on covert operations and deception will inevitably come home.

This article will consider some of the major points of each of the three sets of reform proposals — the ACLU's (which is reprinted in full at the end of this article), the Ford administration's, and the House Select Committee's.

The Secrecy System: The Basic Assumptions

The basic assumption underlying the executive's defense of the intelligence agencies is that the need for secrecy is unchallengeable. They take little notice of

the fact that the United States is not at war and the intelligence agencies have scored their "successes" against Third World nations which are not plausible threats to the security of the United States.

The failure to allow vigorous policy debate within the Executive Branch has allowed extraordinary assumptions to thrive — that the United States, for all its military and economic power, is in some sense besieged, and that the world is necessarily divided into two camps — for us and against us. The middle ground — that emerging nationalistic states have their own interests apart from those of either the US or the USSR — has had little part in policy decisions. And on the domestic front, this meant that dissenters challenging the need for a war against a Third World nation were automatically suspect, in spite of lack of any evidence, as being under the influence of foreign powers.

This is not to say that there are no real threats — nuclear armaments are real enough. And no one seriously disagrees that the details of weaponry and war plans are valid subjects for the classification stamp. But when an inbred logic uses the Soviet ICBM as a justification for covert operations everywhere, including domestic political debate, credulity is strained.

Reforming the intelligence agencies means a serious reexamination of the need for both covert operations and the carte blanche authorization for secrecy which they require. Government secrecy must be carefully limited to *only* what is actually needed for the protection of the nation, and the secrecy system must be carefully restructured so that it can never again be used methodically and cynically to cover-up illegal activity or to involve the nation in ill-conceived military and paramilitary adventures.

The record now shows that secrecy has produced unanticipated side-effects on the body politic. The documented abuses of secret power covered up with overclassification by the intelligence agencies were systematic programs; they were the logical conclusion of a system of secrecy which was allowed to exist outside of the normal system of checks and balances of governmental powers.

The former chief of CIA counter-intelligence, James Angleton, summed up the attitude that a generation of unchallenged secrecy engendered: it is "inconceivable that a secret intelligence arm of the government has to comply with all the overt orders of the government." And in fact, he was correct: the CIA and the Justice Department had an agreement that there would be no prosecutions for CIA illegalities if a trial would threaten to reveal classified information. And since virtually all information about an organization created for clandestine activities is secret, there were no prosecutions for illegal programs. As the Pike Committee observed, the CIA was not out of control, it was "utterly responsive to the instructions of the President." It simply appeared to the naive outsider to be out of control because it was, in fact, beyond the law.

The intelligence agencies, entrusted with national security classification stamps, had authorization to carry out virtually any activity which could be either concealed or "plausibly denied." The list includes such specific programs as the surveillance and harassment of Martin Luther King, Jr., the use of agent provocateurs, testing drugs on unsuspecting citizens, overthrowing democratic governments, the monitoring of all overseas cable traffic of Americans, and the Operation Phoenix assassination program. The full list of known major violations of the public's trust in their discretion and self-restraint is too long to go into here.

In addition to threatening the political process and the right to dissent, secret agencies produce other side effects in the body politic. Secrecy produces corruption as one of its logical consequences — the corollary of secrecy is cover-up, which in turn requires rewards for those who provide cover. Howard Hughes' evasion of such legal tangles as extradition and anti-trust suits clearly demonstrates that special treatment under the law is available for someone who is in a position to help the CIA with covering up operations.

There are pragmatic as well as principled arguments against persisting in a misplaced trust that the executive branch will somehow exercise self-discipline and not abuse the power of secrecy. Not only is the flow of information to the outside of such organizations severely limited, it is also limited within them. The Pike Committee found, for example, that NSA reports of the impending outbreak of the 1973 Middle East War had been considered too "sensitive" to be disseminated to a key military analyst, meaning that there was no way for him to predict the war's outbreak.

Secrecy has other insidious aspects. It allows the control of information, such as the selective release of information in order to control public debate, to muster support for their favorite policies, and to discredit critics.

It has taken an appalling series of foreign and domestic debacles, ranging from Operation Phoenix to Operation CHAOS, from the Vietnam War to Watergate, to make it clear that secret organizations cannot be relied upon either to determine accurately

the genuine national security interests or to exercise the self-restraint necessary to guard the freedoms they were created to protect. For the first time, there is a growing appreciation that Congress and the public must take back some of the authority given to the presidency. The March 1st Report of the Senate Committee on Government Operations, dealing with a "Senate Committee on Intelligence Activities" reflected the increasing realization that a balance must be struck between the right of the people in a democracy to know what their government is doing and the need to protect some information in the interests of the national security.

Covert Operations Abroad: The Grand Rationale

The Ford "reform" program is primarily designed to guard against any limits being placed on presidential authority to carry out covert operations abroad, rather than to limit abuses of power. The administration's provisions, which are discussed later, are designed in large part in order to protect the presidential claim that the Constitution somehow provides that the executive has an inherent power to practice secret warfare and interference in the internal affairs of other countries, without congressional knowledge or consent.

The Ford EO places a restriction on political assassination but implicitly retains the right of the intelligence agencies to use kidnapping, bribery, extortion, espionage, paramilitary adventure, burglaries, drugs, electronic surveillance, manipulation of the press, fixing elections, and any other covert action techniques it can invent. This is a heavy arsenal indeed for unrestricted use against countries with which we may, as in the case of Chile, have Senate-approved treaties respecting their sovereignty.

The executive consistently and vigorously insists that the security of the United States justifies such an arsenal. Yet the Pike Committee was unable to find indications "that covert action has been used in furtherance of any particular principle, form of government, or identifiable national interest."

The ACLU recommendations for controlling the intelligence agencies begin with the argument that the time has come to ban all such covert operations, including espionage in peacetime, and recommends that this redefinition of its mission begin by renaming the CIA the Foreign Intelligence Agency. The United States simply cannot afford to sanction abroad what it cannot afford to sanction at home. Basic political rights should not stop at the U.S. border and recent revelations make it doubtful whether the U.S. can maintain at home a democracy with room for lawful political dissent, while systematically subverting democratic principles abroad. Such activities can only breed contempt for the democratic principles with which the United States has tried to identify herself.

Espionage in peacetime *can* be banned — virtually all our useful and reliable intelligence comes from overt sources: satellites, computers, electronics, public sources. To allow the systematic use of spies would leave open the door for covert action because so much of the information collected by human espionage is generated by covert action techniques. The use of spies means that special protections, covers, and favors must be maintained, and, in doing so, must corrupt the society where they are operating and must threaten to expand into our own. It is also worth reiterating that the US espionage successes have not been in the closed societies which actually could threaten the security of the United States, but in weak Third World nations.

The House Committee recommendations do not challenge executive assumptions and accept the idea that controls, rather than basic changes, are enough. Their proposals involve, for example, placing limits on covert actions, such as requiring such programs to be terminated within twelve months and closing up potential loopholes in the Ford ban on assassination by explicitly prohibiting both "direct and indirect" attempts. They would also place a ban on paramilitary activities except in time of war. Their focus is to control covert actions by drawing circles around them: the Director of Central Intelligence would have to notify the congressional oversight committee of any covert actions within 48 hours of their approval; the committee recommendations try to set up a system of accountability for the decision to take such action — DCI is required to detail the nature, extent, purpose, risks, likelihood of success, and costs of the operation; the President would be required to certify that national security required it; and each member of the Committee within the National Security Council which approves such actions would have to present the oversight committee with his or her written recommendations on the action.

Secrecy: The Cover-up Privilege

Secrecy and cover-up have gone hand in hand. To control the intelligence agencies it is essential to place their authorized activities within manageable bounds, but given that there are a few kinds of information

which genuinely need secrecy, there must also be devised a system which will counter-balance the tendency for secrecy to generate cover-ups of abuses of power.

Overclassification continues to be a fact of life. At the present time, the public and the Congress's main source of information about the internal workings of secret executive branch agencies consists of the unreliable but indispensible flow of leaks to the press.

The Ford "reform" package does nothing that would change the reality of overclassification, either as a matter of bureaucratic routine or as a matter of intentional cover-up. What the Ford package *is* designed to do is to cut down as drastically as possible on the flow of leaked information, thereby cutting down on the one method of maintaining accountability that the public currently has.

Various executive offices have been in an almost constant uproar about this or that leak, yet the administration has been unable to point to any leaks that actually have damaged the national security rather than the reputation of agencies. One aspect of foreign policy consensus that has remained is the understanding that it is necessary to protect that very small amount of information that would genuinely threaten the national security if released. The usual leaks by various bureaucratic factions for or against some policy continue, but the most important leaks remain ones which have imposed some form of accountability on the executive. If there is any actual increase in official integrity in the post-Watergate atmosphere, it is due to the recognition that more than ever before, someone is likely to blow the whistle.

The right and obligation to blow that whistle is a cornerstone of the ACLU's reform proposals. Whistleblowing should be backed up with criminal sanctions for officials covering up violations of the criminal law or agency charters or who fail to report such violations. And whistleblowers, as the best currently available safeguard, should have a guarantee of protection from disciplinary sanctions of the sort used against Ernie Fitzgerald in the C-5 cost-overrun scandal and from criminal prosecution, used against Daniel Ellsberg for leaking the Pentagon Papers.

At the same time, it is essential to give whistleblowers an effective forum. The free press is essential, but it cannot be expected to assume responsibility for investigation and prosecution. The role of special prosecutor must be established and given enough teeth to make sure that government officials are not above the law. This would necessarily include access to all intelligence files and the ability to use such information in court.

Both the ACLU and the Pike Committee call for a legislated classification system to replace the current one established by Richard Nixon in Executive Order 11652. The ACLU scheme, in addition to limiting classified information to three narrow categories of technical and tactical military information, would provide explicitly for a mandatory exemption for any information relating to government activities in violation of the law.

By contrast, the Ford EO 11905 glances over the critical problem of overclassification and cover-up by offering only a brief admonition that the heads of foreign intelligence agencies follow the standing executive order on classification, EO 11652, which is a telling example of the ineffectiveness of executive orders for remedying executive abuses; on its face, it is a reasonable document, deploring overclassification and setting up a Classification Review Board, but it has produced no discernible change in the classification system.

Instead of making a serious effort to deal with cover-up by classification, the new executive order places its energies squarely behind plugging leaks. It makes employees of the executive branch and its contractors sign an agreement not to disclose information dealing with "sources and methods" of intelligence — whether or not that information would harm the national security instead of revealing a wrongdoing. The order also claims the authority — without legislative sanctioning — to seek a court injunction to enforce prior restraint on publication, i.e., political censorship.

To bolster these provisions, the Ford package contains a legislative proposal which would impose a five year sentence and/or a $5,000 fine for disclosing information relating to intelligence sources and methods, and would provide the legislative authority for prior restraint on publication. In effect, the Ford "reforms" propose to end the abuses of secret power by repealing the First Amendment to the Constitution; government employees are required to sign away their consciences and their rights as a condition of employment.

The "sources and methods" designation in the Ford provision is ominous; it has been used to "lawfully" conceal anything in the intelligence agencies that the executive wanted concealed. Nixon, for instance, claimed this classic rationale in an effort to deflect an investigation from some CREEP money laundered in Mexico. There is nothing in the administration's package which would narrow the use of the "sources and methods" claim or would protect whistleblowers. Members of the press could, for example, be called

before a grand jury and, on threat of contempt, be forced to name their sources.

Investigative Techniques: Guarding Against Abuse

The investigations of the past year have each reached the conclusion that the intelligence organizations used secrecy to cover blatantly illegal tactics against Americans who were exercising their constitutional right to political dissent. Once leaked and then documented, the outcry against such violations of the public's trust was so strong that the administration was forced to respond. The Ford "reforms," however, are intended to give only the appearance and not the substance of addressing these systematic abuses.

The Ford Executive Order's "Restrictions"

The Ford Executive Order, touted as providing strict limitations on the collection of intelligence, actually authorizes virtually all of the techniques which had been the subject of public outcry. It begins by saying that

> *The measures employed [in investigations] . . . . must be conducted in a manner which preserves and respects our established concepts of privacy and civil liberties.*

But none of the EO's "restrictions" apply to the FBI, and the restrictions themselves are so peppered with exceptions that it ends up giving expanded authority to conduct the very kinds of investigations which outraged the public.

According to the EO, present and former employees of intelligence agencies and present and former employees of contractors, and anyone who is in contact with them, can be lawfully surveilled. Therefore, virtually everyone in the country could be tailed. This is especially interesting because, given secret contracts, many employees of intelligence contractors have no idea who their indirect employer is.

The EO also breathes new life into all the Operation CHAOS rationales. Intelligence may again be collected on "persons or activities that pose a clear threat to intelligence agency facilities or personnel." This was the rationalization for CHAOS infiltration of the Women's Strike for Peace and other anti-war groups. Given the record of the agencies, permitting general intelligence surveillance rather than limiting surveillance authority to criminal investigations is clearly tempting fate.

According to the EO, persons "reasonably believed to be acting on behalf of a foreign power" can be surveilled — this is another rationale used to justify surveillance of the anti-war groups, in spite of the fact that there were no significant connections to foreign powers.

Anyone who an intelligence agency claims it is considering approaching for employment — whether or not the subject has any interest in applying for a job — can be investigated.

The NSA is authorized by the EO to monitor the overseas cable traffic of Americans to learn about their dealings with foreign governments and foreign companies. Any contact with foreigners makes surveillance legitimate; all companies with overseas commerce are fair game.

In short, the EO legitimizes virtually everything which the intelligence investigations had meant to repudiate through disclosure, and the EO does this all with a representation that this constitutes "tough new restrictions."

For all the expanded authority to revive the old threats to civil liberties which the Ford "reform" package gives the intelligence agencies, there are no commensurate safeguards proposed.

All of this surveillance is to be carried out with no safeguard but the approval of the Attorney General; the EO makes no mention of court orders. There are no provisions for a special prosecutor, for more aggressive Justice Department prosecution policies, for workable oversight, or for any structural changes which could make a difference. The EO could have, for example, tried to install safeguards such as ensuring that surveillance records contain only that information which bears on criminal activities, or it could have included criteria specifying when a surveillance should be ended if no evidence of criminal activity turned up.

The cynic must conclude that such safeguards were not included precisely because the purpose of the Ford package is to expand executive branch authority to reflect its broad view of its constitutional mandate whenever it claims overriding "national security" interests. It has learned nothing from the last several years.

House Committee Proposed Restrictions

Legislation is now necessary which will override the executive order, reaffirm the Bill of Rights, and make certain that abuses of power will not recur.

The House Select Committee's recommendations include legislation requiring that, to plant informers, the intelligence agencies must get a warrant based on a showing of probable cause that a crime has been or is about to be committed. They also recommend that the intelligence organizations be forbidden to give money for the purpose of maintaining cover to the media, to religious groups, or to educational institutions. Media manipulation would likewise be prohibited — no more covert printing, planting, or suppressing of stories in the United States. The

foreign and military agencies would be prohibited from giving direct or indirect training or supplies to domestic police departments.

ACLU Proposed Restrictions

The ACLU's recommendations arise from the record of abuses — there is a pressing need for legislation which will place systematic restrictions on the techniques that can be used in investigations. The executive branch has a clear record of expanding any ambiguity or latitude into a broad authorization for executive power; anything less than the strictest reaffirmation of the Bill of Rights will lead to fresh abuses of power by secret agencies.

The ACLU would permit only investigations of crimes (which includes of course espionage and sabotage); but domestic intelligence operations (which by definition do not include probable cause to believe that a crime is involved) and keeping records on lawful political activities would be prohibited. Wiretaps, telecommunications taps, and burglaries cannot, in the ACLU's view, meet the Fourth Amendment standards for search and seizure and should be banned. Mail openings, mail covers, and the inspection of bank and phone records should be permitted only with a warrant issued on a showing of probable cause.

Programs for Reform: Designing Remedies into the System

The intelligence agencies were created on an almost ad hoc basis; since their intelligence functions were secret, much of their institutional design has also been kept secret. And in spite of the obvious potentials for abuses that are inherent in secret governmental institutions, there was no system of safeguards designed into their organizational structures. It was simply assumed that American officials, from the President on down, could be trusted.

The investigations of the past year have made it plain that this trust was unfounded. The time has come to design a system that will make accountability clear and install safeguards against both the subversion of civil liberties and ill-conceived covert action adventures that have been carried out in the name of an American public which has no idea what is going on.

The remainder of this article considers some of the basic questions involved in designing remedies into the structure. For instance, what are the differences between "reform" by executive order and reform by legislation? How much can be expected from executive oversight, and what would effective congressional oversight look like? What of remedies in the courts? And what about clearly defined charters for the agencies' functions or the reshuffling of the executive's internal structure?

Comparing Executive and Legislative Reforms

Some of the thrust of the Ford executive order is intended to preempt the momentum on Capitol Hill for legislation to reform the intelligence agencies by actually limiting executive authority. But the idea of offering an executive order to correct the abuses of executive branch power is an inherent contradiction. Ford's EO actually outlines increased powers and decreased accountability for the intelligence agencies, but it would be far more surprising if an administration were to actually decrease its own powers in order to protect other institutions of the society. The ACLU recommendations are based, by contrast, on a premise that legislated reforms are essential to treat executive abuses.

The Ford EO is designed to sound good in summary, whether on TV or on a press release fact sheet. The real content, however, is buried within thirty-six pages of fine print; each restriction intended to "reform" the intelligence agencies is followed by a string of exceptions which turn the substance around and authorize what in summary they seem to prohibit.

As the major bulwark against the temptation of future abuses presented by these expanded functions, the administration offers us the President. Ford assures the American people that they will not elect an unreliable president — and he offers this assurance a scant four years after Richard Nixon's 1972 landslide.

Executive orders stand or fall at the whim of the current President. Unlike laws, which require the vote of Congress and hence public debate, the EO can be changed within minutes and without public debate. Ford's package contains an unacknowledged example of this. In 1967 the scandal of the CIA's support to the National Student Association was remedied by an executive order incorporating the Katzenbach Guidelines, which prohibited the CIA's giving any "covert financial support" to any educational or voluntary organization. Phrasing the repeal of this restriction in the language of seeming reform, Ford's EO now allows the CIA to give such covert financial support if it notifies "the appropriate senior officials of the academic institutions. . . ."

Restrictions which are imposed on the intelligence agencies by the President and which can at any time be repealed by the President, also contain the implication that if the President instructs an official to bend the EO rules, he has every reason to expect compliance. There are no protections whatsoever from abuses carried out with the President's knowledge and safeguarded only by the President's Justice Department.

EO's offer another opportunity for government by ambush: secret addendums. The Ford order specifies that "In some instances detailed implementation of the

Executive Order will be contained in classified documents." The public, after decades of plausible denials as to wrongdoing, is left with nothing but another denial that such implementing directives do not contain and will never be altered to contain the license for further abuses of power.

Executive Oversight of the Executive?

The Ford EO is designed to keep power over the intelligence agencies within the executive branch rather than spreading that responsibility among a number of institutions — such as congressional oversight committees, a special prosecutor, and lawsuits in civil courts — to act as back-ups to each other.

The administration's reforms propose that executive branch employees with knowledge of "questionable activities" in the foreign intelligence agencies (again, the restrictions in the EO do not apply to the FBI), should go to the "appropriate authorities." Since, as the President defines it, Congress is an appropriate authority only if a regularly constituted committee already knows enough to ask for specific information, the only authority to whom a lower echelon official with a troubled conscience could turn is the President's Intelligence Oversight Board set up by the EO. There are literally no provisions for taking information of wrongdoing outside the executive branch's system of self-interests. An official with knowledge of abuses is told to go through channels within the hierarchy which spawned those abuses — the process is virtually guaranteed to be ineffective.

The three members of the Oversight Board are a clear signal that nothing is intended to come of it. While the EO specifies that Board members may not have *present* ties to the agencies they oversee, there is nothing preventing them from being former members of the intelligence community and from having a still-active esprit de corps as their first loyalty. Ford's appointment of veteran cold warriors who are already inured to the gambits of the intelligence community does not generate much confidence that they would find very much in the activities of the intelligence community improper. And even with the best of intentions on the part of the Board members, the Ford "restrictions" on agency activities are so expansive that the Board's role is really one of establishing and maintaining appearances, rather than reforms.

Even so, lower echelon officials are given no direct access to the Oversight Board. Reports of questionable activities are instead to be filtered through the offices of the Inspectors General, who themselves have a well-established history of assisting cover-ups; they have in the past produced papers on "potential flap activities" which their agencies should take care to conceal. The EO offers admonishments which sound good, but no structural reforms which would change the role of the Inspector General.

But even assuming that the Board did decide that something was improper, it is authorized only to report it to the President and/or the Attorney General. The Ford executive oversight system is designed so that there are no "appropriate authorities" outside the executive branch hierarchy; neither the uneasy official, the Inspector General, nor the Oversight Board members are authorized to report wrongdoing to Congress or to a special prosecutor, whether or not the President or Attorney General acts on it.

Since so many of the known abuses of intelligence agency power came from the top, it is clear that the Oversight Board "reform" consists of reporting improprieties to the perpetrators of those same improprieties. The only assurance that the public is given is that Watergate has somehow magically changed this and that abuses will not again come from the top.

There is on record an internal reporting system which did work — up to a point — and the Ford proposals carefully avoid any resemblance to this. As a response to the CIA's involvement in Watergate, then-Director of Central Intelligence James Schlesinger sent a memorandum to all CIA employees instructing them to report any knowledge of questionable activities directly to his office — not through the Inspector General or any other channel. This assurance of confidentiality signaled that this was a serious request rather than a housecleaning charade. And up to a point, it was effective. The results were the CIA "Family Jewels," the basic compendium of CIA abuses of power. But the Jewels remained in the office of the DCI — indeed, what purpose would there have been in forwarding them to Richard Nixon?

In spite of Ford's reassurances about the integrity of the new post-Watergate official, neither his EO nor the actions of his administration show any indication that official cynicism has lapsed. Without institutions to back up changes there is no change in accountability. There have been no prosecutions for criminal activity; the day after the promulgation of the EO, the Ford Justice Department announced that it had decided not to prosecute Richard Helms for a burglary which the Rockefeller Commission had cited as clearly illegal.

Oversight from Outside the Executive

The ACLU recommendations for establishing accountability depend on greatly reducing secrecy, developing new institutions, and taking the privilege of cover up out of the system. The office of permanent special prosecutor, with a mandate to investigate and prosecute criminal activities in the intelligence agencies, should be created. The secrecy system must be no license for cover-up, and the prosecutor must have full access to all agency files and to be able to use classified information in court.

The ACLU recommendations also include a combination of criminal and civil sanctions to back up the legislated limits on their intelligence agency activities. Ordering violations of the agency charters, willfully deceiving Congress or the public about such violations, and the failure to report such violations to the special prosecutor should be made criminal offenses.

In addition to the criminal sanctions, the ACLU recommends that civil remedies be made more readily available for victims of unauthorized surveillance techniques. In this way, individuals would be able to enforce their own civil liberties without having to rely on the special prosecutor or public outcry. The citizen's rights in court should be bolstered by a statute eliminating the need to prove actual damage to the individual — violation of civil rights in itself should be sufficient basis for winning in court. To make civil remedies available to people and groups of modest resources, the statute should provide for the awarding of attorney's fees and court costs. And finally, the statute should expressly prohibit a "good faith" defense — an official's claim that he or she thought the action was lawful because, for example, "national security" was involved.

The Pike Committee recommendations stop short of this, advising the creation of an Independent Inspector General for Intelligence, who would have "full authority to investigate possible or potential misconduct." The new IGI would report directly to the congressional oversight committee, but the House recommendations contain no special provisions for taking the prosecution of offenders out of the Justice Department or for establishing civil remedies.

Congressional Oversight: Control of Information

All three sets of recommendations call for some form of congressional oversight of the intelligence agencies, but the differences between the Ford recommendations and those of the ACLU and the Pike Committee are fundamental. Unless Congress has a clear and enforceable right to obtain and to release information, oversight can have only form without substance.

Ford begins his proposals for congressional oversight with a contradiction expressed in soothing phrases: "successful and effective Congressional oversight of foreign intelligence agencies depends on mutual trust between the Congress and the Executive," as if assertive congressional scrutiny would threaten the stability of government. Ford goes on to design an oversight committee which trustingly rubber stamps executive determinations and is intended more to give respectability than to provide a counterbalance to the intelligence community initiatives. To reduce leaks, he proposes one joint committee rather than the current six to which the Executive Branch must now report its covert operations. As with the other proposals, the FBI is not deemed a "foreign intelligence agency" and therefore is not included.

The ACLU and Pike Committee recommendations, by contrast, provide a clear mandate for oversight committee autonomy and authority: separate committees in each house with jurisdiction over CIA, FBI, and NSA, rotating memberships to avoid cooption, concurrent jurisdiction with other congressional committees, and authority to enforce its demands for information. The ACLU proposal in addition supports a special mandate for the committee to oversee compliance with some of its other reform proposals, including a new, more limited classification system, new surveillance technologies as they are developed, and any and all activities which might endanger individual rights.

But it is on the issue of secrecy that the real distinctions between Ford's design for an oversight committee and a design which tries to work against the usual fate of congressional oversight committees — inattention. Effective oversight requires that a committee be fully and currently informed — including prior notification of covert actions so that (assuming that covert action is not banned outright) objections can be raised against executive branch schemes that would not have the support of Congress. Ford's plan operates on the assumption that the President has an inherent right to involve the country in covert operations. The threat of veto by disclosure — far from providing checks and balances and placing accountability into the system — is seen as an evil to erect institutions against.

But his definitions of leaking are as expansive as his definitions of sources and methods. Citing the executive branch's interpretation of constitutional law as if it were a matter of established fact, Ford's

proposals to Congress maintain that "respect for the Constitution" requires the vote of both houses to release information over the objection of the President; anything else, by implication, is a leak.

For instance, in what might be called the bill's "Harrington clause," a committee member passing information to another member of Congress outside the committee would be a leak. To ensure that there are no irregular channels of information (leaks) from the executive to the Congress, the Ford bill would make it a felony for someone to go to either a member of Congress or a committee with information; communication to Congress is legitimate only if "pursuant to lawful demand" of a "regularly constituted" committee. Taking the initiative to advise Congress of some questionable covert activity is a felony. Barring someone taking this kind of risk, Congress cannot know enough about a covert program to ask a given official to testify before them.

The ACLU recommendations address the proven threat of wrongdoing rather than the executive's asserted threat of "leaking." Any member of Congress should have an absolute right to release classified information which contains evidence of wrongdoing or violations of the limits Congress may place on the intelligence agencies. Further, the ACLU recommends confirmation of Congress's absolute right to release classified information in general. Executive privilege, a catch-all claim of recent presidents, should be narrowly applied only to actual *advice*, giving Congress access to all other information; advice itself should be subject to congressional access if there is probable cause to believe that it pertains to crimes, as in the Nixon case.

The Pike Committee's recommendations are also insistent that congressional committees be fully and currently informed. With the committee's emphasis that the intelligence community be subject to financial control, they recommend that the oversight committee be informed of the gross budgets of each intelligence agency, that the Government Accounting Office be given full authority to audit this arm of government as all others, that internal audits likewise be encouraged, and that the transfers of funds within the agencies and other jugglings of the books be open to congressional oversight.

The House committee recommendations also provide that a majority of the committee have the authority to release information. Committee members who disagreed with a committee decision not to release information would then be able to take the issue to other members of the House, provided that these members sign an agreement not to divulge the information. If the dissenters then obtain the signatures of 1/5 of the House supporting release of the information, the House would vote in secret session to determine whether the information should be released to the public over the negative vote of the Intelligence Committee. The House also recommends that it require a two-thirds vote of the House to censure or expel a member who releases classified information which actually "jeopardizes the national security."

Structural Reorganization of the Intelligence Agencies

Ford's claim that his reforms of the intelligence agencies place accountability on individuals rather than on institutions seems to imply that an institutional structure weighted against abusing power would somehow work against the moral integrity of individuals. What Ford does is to rephrase in terms o accountability the discredited idea that somehow American officials will automatically be different, that they can be trusted to have the self-discipline not to abuse the public trust.

One advantage of redesigning institutions is that it can make it clear to public officials just what the public is trusting them not to do. Organizational structures should make it impossible for the well-intentioned bureaucrat to rationalize that "national security" required an exception to the rules in a particular instance. The rules of the Ford Executive Order are so loosely drawn that it would be extremely difficult for an official to determine just where the line between the permissible and the illegal should be drawn.

The ACLU Recommendations: Charters

One of the basic features of the ACLU's recommendations is that the intelligence agencies must have legislated public charters which would spell out an agency's legitimate functions and clearly prohibit all other activities. Government officials have a right to be clearly on notice that their national security functions extend only so far and that there is no "national security override" beyond those clear and specified limits.

The legislated charters proposed by the ACLU for the various intelligence agencies are outlined below. The Ford EO and the House Committee recommendations do not include specific and systematic recommendations for the rewriting of charters in general, but some of their features would, in effect, change or restructure the charters. A comparison of the three sets of recommendations is offered below.

CIA. The *ACLU* charter includes a major redefinition of the CIA mission: it would be renamed the Foreign Intelligence Agency, making it clear that it had no domestic intelligence function. It would be limited to collecting and evaluating foreign intelligence information. Espionage in peacetime and all covert action would be specifically abolished. The *Ford EO* makes no change limiting the CIA's func-

tions; rather, it legitimates some of their previously unauthorized activities, such as domestic operations. The *Pike Committee* recommendations include some limitations on the CIA's functions but do not call for a new charter as such; covert operations would still be permitted.

FBI. The *ACLU* recommendations call for a legislated charter specifying that the FBI is authorized only to conduct criminal investigations — no loopholes for COINTELPRO activities or assertions that intelligence investigations may delve into political activities and are not subject to Fourth Amendment standards in the way that criminal investigations are. The *Ford EO* gives the FBI broadly expanded powers. None of the EO's "restrictions" on the activities of foreign intelligence organizations apply to the FBI; instead, the Bureau is specifically given broad "counterintelligence" authority within the United States, including collecting intelligence about "subversion," which is not actually a crime. With only the approval of the Attorney General, the FBI would be authorized to carry out electronic surveillance and to disseminate information to other intelligence organizations. The *House Committee* recommended substantial limitations on the FBI: the Director's term in office could not exceed eight years; the Internal Security Branch of the Intelligence Division should be abolished and a new Counter-intelligence Division established, which would be limited to dealing only with the activities of foreign-directed groups and individuals; and in order to infiltrate any domestic group, FBI agents would need a warrant issued upon a standard of probable cause.

NSA. The *ACLU* recommendations would flatly prohibit intercepting and recording the international communications of Americans. The *Ford EO* guidelines authorize unlimited eavesdropping on the overseas communications of Americans. The *House Committee* recommends that NSA authority to intercept American conversations be clarified by legislation; the agency should be transferred from military to civilian control.

DIA. The *ACLU* recommends that the military be prohibited from playing any role in the surveillance of civilians and from collecting any information on either civilian or military personnel exercising their constitutional rights. The *Ford EO* has the effect of authorizing the DIA to carry out its activities unchanged; it is to carry out military intelligence, but it does not attempt to limit the scope of that function. The *House Committee* recommends abolishing DIA and prohibiting any military intelligence operations in the United States and operations directed at non-military U.S. citizens abroad.

Conclusion

The Ford "reform" package is not only inadequate, it is a threatening reaffirmation of virtually all the abuses of the past. It is now up to Congress to take the initiative for meaningful reforms which address the record of serious abuses of trust and authority.

AMERICAN CIVIL LIBERTIES UNION:

Proposals for Controlling the Intelligence Agencies

Introduction

Control of our government's intelligence agencies demands an end to tolerance of "national security" as grounds for the slightest departure from the constitutional restraints which limit government conduct in other areas. Preservation of the Bill of Rights as a meaningful limitation on government power demands no less. Government secrecy must be drastically curtailed while restoring citizens' freedom from governmental scrutiny of and interference in their lives. To end that secrecy, limit government surveillance, and create effective enforcement mechanisms the following measures should be adopted:

A. End Clandestine Government Cover-stories and Cover-ups

1. Prohibit the peacetime use of spies in the collection of foreign intelligence. Abolish clandestine organizations* for intelligence collection. Enact precisely drawn criminal sanctions against clandestine governmental relationships with citizens** and against the payments of public or private funds and other things of value, directly or indirectly, to citizens of our own and foreign nations for peacetime spying and espionage.

2. Make it a crime for intelligence agency officials or senior non-elected policy makers willfully to deceive Congress or the public regarding activities which violate the criminal law or limits to be imposed on intelligence agencies.

3. Make it a criminal offense for a federal official whose duties are other than ministerial willfully to fail to report evidence of criminal conduct or conduct in violation of these limits to the Special Prosecutor [see (D)].

4. Protect "whistle blowers" in order to encourage revelation of activities which violate the criminal law or these limitations to Congress and to the public.

5. Create a permanent and independent Office of Special Prosecutor to police the intelligence community. The mandate should be limited to the investigation and

*A "clandestine organization" is one whose agents, officers, members, stockholders, or employees, or its activities, characteristics, functions, name, nature or salaries are secret.

** "Citizen" includes individuals and associations, corporations, firms, partnerships, and other organizations.

ACLU: Proposals for Controlling the Intelligence Agencies *(continued)*

prosecution of crimes committed by officials involved in this area. There should be time limits on the length of time the Special Prosecutor and his or her staff may serve. The Office should have a mandate to initiate probes of other government agencies to find violations, as well as to prosecute those alleged violators brought to its attention. It should have access to all intelligence community files, and be empowered to use any information necessary for successful prosecution of criminal offenses. If the information is used, it must be given to the defendant.

B. Drastic Reduction of Secrecy

1. Limit the authority of the Executive Branch to classify to three categories of information: technical details of weaponry, knowledge of which would be of benefit to another nation; technical details of tactical military operations in time of declared war; and defensive military contingency plans in response to attacks by foreign powers, but not including plans of surveillance in respect to domestic activity.

2. Create a mandatory exemption from classification of any information relating to U.S. activities in violation of U.S. laws.

3. Limit executive privilege to the "advice" privilege, guaranteeing Congressional access to all other information no matter what its classification. Congress would also have access to "advice" when it has probable cause to believe it contains evidence of criminal wrongdoing or violation of the limits Congress imposed by statute or resolution on intelligence activities.

4. Make absolute the right of Congress to release unilaterally information classified by the Executive Branch. Individual members of Congress cannot be restrained by classification procedures from releasing information which contains evidence of criminal wrongdoing or violations of the statutory limits to be imposed on intelligence activities.

5. Define proper roles for intelligence agencies [see (C)] in public debate. Make the budgets for the various intelligence agencies public.

C. Public Determination of Agency's Activities

1. Create legislative charters for each major agency, all provisions of which are to be publicly known. These would provide that all activities not specifically authorized therein be prohibited. The details would be required to be spelled out in agency regulations which are subject to public comment and Congressional control.

2. Limit the terms of agency heads. Also increase the independence of general counsels and require their written opinion on the legality of any operations nearing the limits we establish.

3. Limit the CIA, under the new name of the Foreign Intelligence Agency, to collecting and evaluating foreign intelligence information. Abolish all covert and clandestine activities.

4. Restrict the FBI to criminal investigations by eliminating all COINTELPRO-type activity and all foreign and domestic intelligence investigations of groups or individuals unrelated to a specific criminal offense.

5. Limit the IRS to investigations of tax liability and tax crimes. IRS access to, or collection of, information on taxpayers' political views and activities should be barred.

6. Prohibit the National Security Agency from intercepting and recording international communications of Americans, whether via telecommunication, computer lines, or other means.

7. Prohibit the military from playing any role in civilian surveillance. No information on civilians and military personnel exercising constitutional rights should be collected.

8. Establish a separate agency to conduct security clearance investigations for federal employees, judgeships, and presidential appointees. Investigations should not take place without the applicant's authorization. Files should be kept separate and limited to the purpose of the security investigation. Exceptions in the 1974 Privacy Act which deny people access to their files should be repealed.

9. Flatly prohibit exchange of information between agencies, except for evidence of espionage and other crimes which may be sent to the agency responsible for investigating or prosecuting them. Existing government files on First Amendment political activities should be destroyed.

D. Limit Investigative Techniques

1. Prohibit entirely wiretaps, tapping of telecommunications, and burglaries.

2. Restrict mail openings, mail covers, inspection of bank records, and inspection of telephone records by requiring a warrant issued on probable cause to believe a crime has been committed.

3. Prohibit all domestic intelligence and political information-gathering. Only investigations of crimes which have been, are being, or are about to be committed may be conducted.

4. Prohibit the recording of and keeping files on those attending political meetings or engaging in other peaceful political activities.

5. Make limitations public in regulations subject to public comment and Congressional control.

E. Enforcement

1. Make it a criminal offense for an official knowingly to order the violation of the above restrictions on both the scope of the agency's activity and its techniques.

2. It should also be a separate criminal offense to fail to report violation of the restrictions described in A, B, C, and D to the Special Prosecutor or to deceive Congress and the public about the same.

3. Establish a wide range of civil remedies for those whose rights have been violated by intelligence officials or organizations, patterned after those now available for victims of unauthorized wiretaps and violations of the Privacy Act. Such a statute should eliminate the present jurisdictional amount requirement; eliminate any need to prove actual damage or injury; declare certain practices to be injurious and provide liquidated damages for those aggrieved; provide for recovery of attorneys' fees and costs; and disallow a "good faith" defense.

F. Congressional Oversight

Create *separate* committees in each House with: jurisdiction over authorization of funds for CIA, NSA, and FBI; legislative authority on entire range of intelligence activities; oversight of all agencies engaging in intelligence activities; a special mandate to oversee and legislate with respect to: (a) compliance with sharply curtailed classification system, (b) new surveillance technology, and (c) all intelligence activities which might endanger individual rights; rotating membership for Committee members; and limits on the length of time any staff member may work for the Committee.

domestic activities of United States persons except," and then the EO gives the authority NSA has sought: "information concerning corporations or other commercial organizations which constitute foreign intelligence or counterintelligence." A look back to the list of definitions reveals that foreign intelligence means "information concerning the capabilities, intentions and activities of any foreign power, or of any non-United States person, whether within or outside the United States, or concerning areas outside the United States.

Translated into English, this means that NSA is authorized to monitor the overseas cable traffic of Americans for the purpose of learning about their dealings with foreign governments or companies, their activities in foreign countries, and the information that they may have obtained about foreign countries.

The President's Executive Order also gives CIA authority to revive discredited programs in the United States, in spite of Congress's intention in the 1947 National Security Act to limit it to only operations abroad. The agency is now specifically authorized to investigate present and former CIA employees, people who come in contact with such employees, those who "threaten" the security of its installations, and those who are potential sources of information. Americans abroad may come under CIA surveillance if it is claimed they threaten national security.

The CIA's much-debated covert operations come off virtually unscathed. They are specifically authorized and new procedures instituted for their approval. The only limit is a ban on political assassinations; activities such as bribery, kidnapping, disinformation, and fixing elections are unmentioned and therefore unrestricted.

Any doubts about the need for legislated charters have been swept aside by this presidential pardon of the intelligence agencies. Far from seeking to punish those who violated the constitution and the laws of the land, President Ford has granted these very agencies a new license to spy on Americans. Each agency must have a legislated charter, backed up by criminal and civil penalties, written in simple English and stating clearly what they can and cannot do. These charters must be forged in a process of public debate and close congressional scrutiny so that the meaning of every phrase will be clear to all and so that they can only be changed by a similar public process, not by executive fiat.

We need public charters, arrived at with the participation of those who understand and accept the Bill of Rights, instead of charters secretly drafted by those who they purport to control and phrased in gobbledygook and which are an invitation for continued usurpation of our rights.

Point Of View

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Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

JAMES MADISON TO THOMAS JEFFERSON,
MAY 13, 1798

Point Of View

The Fraud Plan

MORTON H. HALPERIN

President Ford's Executive Order on the intelligence agencies purports to control them and to prevent abuses; in reality it is a fraud and only confirms the authority of the intelligence agencies to conduct surveillance activities directed at lawful activities of American citizens. The FBI, for example, is specifically exempted from the "restrictive" provisions of the order and simply receives new direction from the President to conduct foreign intelligence operations in the United States.

All this came about in part because the White House permitted the intelligence agencies themselves to write the exception clauses into the EO. In some cases it appears that the White House officials did not fully understand what was happening — a predictable result from a process that excludes critics from the drafting process.

The agency that appears to have played this game most successfully is the National Security Agency. There is, for the first time, a full page public description of the functions of the agency, but it is an advanced species of gobbledygook. It tells the reader only that the agency has responsibility for "signals intelligence," ostensibly meaning that it is to make and break codes and to intercept all other air wave messages, such as those connected with Soviet missile tests. So far, so good, until one reflects upon the fact that NSA had been unable to resist also monitoring communications within the United States: since the Second World War, NSA has been scanning all cable traffic leaving the United States.

This raised two problems. The Ford order changes a 1967 presidential directive limiting authority for domestic electronic surveillance to the FBI and now authorizes other agencies (except the CIA) to conduct electronic surveillance with only the approval of the Attorney General to safeguard our rights. The second problem seems more serious. NSA of late has concentrated on searching the cable traffic of American firms for what is called economic intelligence. In a carefully written paragraph, the Executive Order now authorizes such interceptions without anyone realizing what is going on. A careful look is instructive since it gives insight into what is going on on every page of the new order.

The key paragraph appears in the section labelled "Restrictions on Collection" which begins as follows: "Foreign intelligence agencies shall not engage in any of the following activities." Item (7) in the list of restrictions reads: "Collection of information, however acquired, concerning the

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